

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Digital Broadcast Copy Protection	)	MB Docket No. 02-230
	)	
	)	
	)	

**REPLY COMMENTS OF  
NATIONAL FOOTBALL LEAGUE,  
OFFICE OF THE COMMISSIONER OF BASEBALL,  
NATIONAL BASKETBALL ASSOCIATION,  
NATIONAL HOCKEY LEAGUE,  
WOMEN’S NATIONAL BASKETBALL ASSOCIATION,  
NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,  
PGA TOUR, INC., and  
LADIES PROFESSIONAL GOLF ASSOCIATION**

The National Football League (“NFL”), Office of the Commissioner of Baseball (“Baseball”), the National Basketball Association (“NBA”), the National Hockey League (“NHL”), the Women’s National Basketball Association (“WNBA”), the National Collegiate Athletic Association (“NCAA”), the PGA TOUR, Inc. (“PGA TOUR” or “Tour”) and the Ladies Professional Golf Association (“LPGA”) (collectively, “Professional and Collegiate Sports”) respectfully submit these Reply Comments in response to the comments to the Notice of Proposed Rulemaking in the above-referenced docket<sup>1</sup> on issues surrounding the unauthorized copying and redistribution of digital broadcast signals.

**I. Introduction and Summary**

As explained in their Comments, Professional and Collegiate Sports supply some of the most popular broadcast television programming in the country, much of which is available on

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<sup>1</sup> *In the Matter of Digital Broadcast Copy Protection, Notice of Proposed Rulemaking*, MB Docket No. 02-230, FCC 02-231 (released Aug. 9, 2002) (the “NPRM”).

conventional over-the-air television. Other comments submitted in this proceeding reveal many misconceptions about the technological and administrative workings of the Broadcast Flag, as proposed by the Broadcast Protection Discussion Group (“BPDG”) in its Final Report. Professional and Collegiate Sports leave most of the clarifications of these misconceptions to other parties. These Reply Comments address certain parties’ arguments concerning the incentives for content owners to make digital content available, absent a redistribution control mechanism such as the Broadcast Flag. In addition, Professional and Collegiate Sports respond to the concerns voiced about the impact of the Broadcast Flag proposal on fair use rights and illustrate why a restrictive application of the doctrine is warranted in this context. Finally, Professional and Collegiate Sports note the near-consensus that industry cooperation, Commission action, or congressional legislation is needed to plug the “analog hole” in order to have a comprehensive redistribution control system for digital broadcast content.

## **II. Why the Broadcast Flag is Needed**

Many parties, including Professional and Collegiate Sports, asserted that a robust and enforceable control mechanism designed to prevent the unauthorized redistribution of digital broadcast content is an essential precondition to content owners making digital broadcast content widely available, and that the lack of such a system is slowing the digital television (“DTV”) transition.<sup>2</sup> However, other parties challenged this assertion, noting that content owners and broadcasters are already broadcasting signals in a digital format and speculating that the delay in the digital transition is likely due to other factors.<sup>3</sup>

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<sup>2</sup> See, e.g., Comments of Professional and Collegiate Sports at 6-10; Comments of MPAA, *et al.* at 6-8; Comments of Viacom at 11; Comments of NBC Television Affiliates Association at 1.

<sup>3</sup> Comments of IT Coalition at 11-14; Comments of the Consumer Electronics Association (“CEA”) at 4; Comments of the Electronic Frontier Foundation (“EFF”) at 2; Comments of the Electronic Privacy Information Center (“EPIC”) at 2; Comments of the Home Recording Rights Coalition (“HRRC”) at 4-5.

Professional and Collegiate Sports neither claim to diagnose all the impediments to a successful transition to digital television nor seek to assign blame for such delay. However, it is basic economics and logic that the lack of a mechanism to prevent digital broadcast content from being copied and widely redistributed over the Internet without authorization is a significant disincentive to content owners making digital broadcast content broadly available. Some content owners have been willing to make digital broadcast content available only because of the relatively small number of DTV sets sold and because current bandwidth limits make redistribution of large digital files impractical for most consumers.<sup>4</sup> Notwithstanding these current technical limitations, one major programming producer/broadcaster has already announced that it will withhold digital broadcast content completely if the Broadcast Flag is not adopted.<sup>5</sup> Other parties warn of this eventuality if the Flag is not adopted.<sup>6</sup>

The fact that quantities (albeit small quantities) of digital broadcast content are now available is hardly a rebuttal to content owners' concerns about unauthorized redistribution once increased bandwidth reduces the technical barriers to widespread redistribution over the Internet.<sup>7</sup> Nothing should dissuade the Commission from concluding that if there is not a robust and enforceable system to prevent unauthorized redistribution of digital broadcast content, program owners, including Professional and Collegiate Sports, will be compelled to consider

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<sup>4</sup> Comments of Walt Disney Co./ABC Television Network ("Disney/ABC") at 3.

<sup>5</sup> Comments of Viacom at 1, 11.

<sup>6</sup> Comments of Disney/ABC at 3. Certain parties question why digital television must be broadcast at all. Comments of Consumers Union at 12 ("It is unclear why HDTV has to be broadcast at all."). In response, Professional and Collegiate Sports note that digital broadcast signals are available because broadcasters are required to phase-in transmission of broadcast signals in a digital format. *See also* 47 C.F.R. § 73.624(f) (requiring DTV licensees to simulcast DTV programming beginning April 1, 2003).

<sup>7</sup> The temporary nature of the technical restrictions to widespread transfer of digital content over the Internet should not be underestimated, contrary to those parties who argue that the Broadcast Flag is premature. Comments of EFF at 1; Comments of HRRC at 4-5; Comments of Computer and Communications Industry Association ("CCIA") at 9-10; Comments of Information Technology Industry Council ("ITIC") at 1. The rapid advances of the last decade in distributing material over the Internet -- *see 20<sup>th</sup> Century Fox Film Corporation, et al., v. iCraveTV, et al.*, 2000 U.S. Dist. LEXIS 11670 (W.D. Pa. 2000) -- suggest that impediments to workable downloading of complete episodes of digital broadcast television will not long be a hurdle to piracy. Further, there is currently no technical impediment to downloading short excerpts of video content, which impacts Professional and Collegiate Sports' interest in highlights. *See, e.g.*, <http://espn.go.com/motion>. *See also* Michael Hiestand, USA Today, February 20, 2003, at C2 (noting that more than 500,000 people signed up for ESPN's online service in the first 48 hours); Nat

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protecting their content from unauthorized redistribution by making greater use of conditional access distributors, such as cable and satellite providers, to distribute such content. Consumers used to and reliant upon broadcast reception will be the victims if inadequate copy protection measures produce these unintended consequences.

Some opponents of the Broadcast Flag, many of whom appear to oppose *any* restriction on redistribution of digital broadcast content, urge the Commission to allow “market forces” to produce a solution to digital broadcast copy protection, implying that Commission rules in the absence of clear evidence of infringement are premature.<sup>8</sup> However well-intentioned their motivation, these parties ignore the historical absence of inter-industry cooperation on the digital transition.<sup>9</sup> The result has been a delay in bringing digital content and affordable DTV sets to consumers. Professional and Collegiate Sports submit that market forces have been working against the DTV transition. The small amount of digital broadcast content available, most of which is simulcasting of analog programming, has been insufficient to drive broad consumer interest in DTV sets that still can cost well into the thousands of dollars. Given the present lack of protection against unauthorized redistribution of digital broadcast content that is afforded to content owners, and the rampant piracy that is occurring in the digital environment generally, market forces, in fact, are working to drive content owners *away* from providing digital programming to digital broadcasters and to conditional access systems.

At the same time, however, institution of Broadcast Flag protection for digital broadcast content will create market forces that *will* provide content owners with the incentives to make

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Ives, New York Times, February 21, 2003, at C5 (“The videos [of ESPN Motion] are higher in quality than so-called streaming video clips, the standard way to watch moving pictures online.”). See also III, *infra*.

<sup>8</sup> Comments of EFF at 3; Comments of EPIC at 2; Comments of Motorola at 3.

<sup>9</sup> Exceptions include the work of the BPDG and the cable and consumer electronics industries’ recent agreement intended to ease use of DTV reception equipment and foster compatibility between cable and consumer electronics equipment. Letter from Carl E. Vogel, President and CEO, Charter Communications, et al. to Michael K. Powell, Chairman, FCC (December 19, 2002), Memorandum of Understanding Among Cable MSOs and Consumer Electronics Manufacturers. See [http://www.ce.org/press\\_room/press\\_release\\_detail.asp?id=10134](http://www.ce.org/press_room/press_release_detail.asp?id=10134).

their programming available for digital broadcast. After all, the Broadcast Flag *did* emerge from private sector negotiations among affected industries, when the architects realized that Commission rules were necessary to the proposal's effectiveness. Unless uniform regulation is set by the Commission, the result of reliance on market forces alone will be litigation, high transaction costs, considerable uncertainty and delay, and the emergence of a few outliers, who will try to gain a commercial advantage while other content owners lag in making content available in a digital format. Without such certainty, the content community will continue to avoid significant participation in the DTV transition. In this way, a clear and comprehensive set of vigorously-enforced FCC rules on digital broadcast copy protection will provide the regulatory certainty necessary to stimulate the flagging DTV transition by assuring content owners that their product will be protected.

As Professional and Collegiate Sports pointed out in their comments, Commission rules implementing the Broadcast Flag would be consistent with other steps the Commission has taken in the interest of speeding the DTV transition. For instance, the Commission has mandated that new television sets be equipped with DTV tuners.<sup>10</sup> Surely, a requirement that is necessary for widespread digital broadcast content to be available on those DTV sets is as important and as fundamental to spurring the DTV transition as the DTV tuner mandate; indeed, it is a corollary to the notion that sets must include a DTV tuner.

Further, waiting for infringement to occur, as some commenters advocate, would result in a "Catch-22" that would be detrimental to consumers' interests. The Internet sites permitting unauthorized downloading of the small amount of digital television in existence,<sup>11</sup> the substantial evidence of analog infringement, and the recording industry's experience with unauthorized file

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<sup>10</sup> *Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television*, Second Report and Order and Second Memorandum Opinion and Order, FCC 02-230, ¶ 3 (released Aug. 9, 2002).

<sup>11</sup> See, e.g., <http://www.turok.info>.

sharing of digital music all presage the certain infringement of digital television signals absent a redistribution control mechanism and provide more than sufficient justification for the Broadcast Flag.

Any set of requirements adopted must be comprehensive, given the unique characteristics of digital broadcast content that allow near-instantaneous reproduction and redistribution of perfect copies to a virtually unlimited number of people. Incremental rules are plainly insufficient to address what will be an explosion of unauthorized redistribution absent a comprehensive scheme. An argument for comprehensive rules is not contradicted by the inevitability of hackers and the related suggestion that devices will constantly need to be reengineered, as some parties suggest.<sup>12</sup> First, the fact that security devices – for broadcast signals, for currency, for sporting goods, or for any product – are hacked by a few individuals does not defeat their use as effective deterrents to improper use by the vast majority of users. Because of the flexibility of technology afforded by the BPDG’s proposal, the “Table A” technologies approved to protect digital broadcast content likely will be the same as those used to protect digital content delivered by cable and satellite. To indict the Broadcast Flag because it may be susceptible to hacking is to argue against the use of any system for protecting digital content.<sup>13</sup>

Several parties cite to concerns raised by the content community following introduction of the VCR as a rationale for disregarding content owners’ support for a redistribution control mechanism for digital broadcast content.<sup>14</sup> This attempt to undermine the legitimate concerns of copyright owners ignores the qualitative differences between recording of analog signals for playback on a VCR and reception of digital television signals that may be copied and

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<sup>12</sup> Comments of CCIA at 11-12; Comments of Motorola at 4; Comments of Veridian at 10.

<sup>13</sup> Further, it is not true that hacking one device will mean that all devices of the same make and model must be reengineered. Professional and Collegiate Sports’ understanding is that most Table A technologies will include some means of revoking individual device authorizations; a hacker will disable his single device, and no others.

redistributed over the Internet. As Professional and Collegiate Sports (and many other parties) explained in their comments, and as the Commission has recognized, digital television signals may be copied, in perpetuity, with virtually no degradation, and redistributed nearly simultaneously with their reception to a virtually unlimited number of users.<sup>15</sup> The most enterprising, sophisticated user of VCR equipment can do nowhere near the damage to content owners' copyright interests that one user with a DTV set and a personal computer can do. Accordingly, comments such as that of CCIA that "there is nothing special about digital content"<sup>16</sup> are uninformed and ignore that digital broadcast signals create the potential for explosive scales of infringement unthinkable in an analog world.

### **III. Fair Use**

Many parties voice concern that the Broadcast Flag impermissibly interferes with the fair use of digital broadcast content. Justifying unauthorized redistribution of digital broadcast content on the basis of fair use is of particular concern to Professional and Collegiate Sports because of the commercial value of short excerpts of sports telecasts and the specific measures taken to control their use in the current analog environment.

Initially, Professional and Collegiate Sports note that the concept of fair use implies "a use" – meaning, in most circumstances, a single use of a limited amount of copyrighted material to further a permissible goal, such as scholarly research or news reporting.<sup>17</sup> Fair use has never been interpreted as meaning the endless unlimited taking and redistribution of copyrighted material to serve no purpose other than the users' desire for that material.

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<sup>14</sup> Comments of American Libraries Association ("ALA") at 8; Comments of Arizona Consumers Council at 8; Comments of EFF at 22-23.

<sup>15</sup> Comments of Professional and Collegiate Sports at 7, *citing* 15 FCC Rcd 978, ¶ 107 (2000); Comments of MPAA, *et al.*, at 6-8.

<sup>16</sup> Comments of CIAA at 7.

<sup>17</sup> See 17 U.S.C. § 107 (providing examples of fair uses, such as "comment, news reporting, teaching . . . scholarship, or research").

The precise legal contours of fair use to digital broadcast content were the subject of substantial comment. For example, the American Libraries Association claims that “the broadcast flag would grant private copyright owners what are effectively additional intellectual property rights in their content by restricting the rights of users to lawfully use and excerpt that content.”<sup>18</sup> Professional and Collegiate Sports disagree with this assertion, because it assumes that fair use, which the Copyright Act defines as a defense to an infringement action and not an affirmative right,<sup>19</sup> necessarily translates into a freestanding right to redistribute over the Internet excerpts of digital broadcast content, irrespective of the impact on the market for such content. Among other things, this argument substantially overextends the principle underlying the *Sony Betamax* case, which held that time-shifting of analog broadcast television for exclusively personal use qualified as a fair use because it did not impact the marketplace for programming.<sup>20</sup> The Broadcast Flag proposal, it must be noted, does not affect consumers’ ability to time-shift digital broadcast content. Far from an expansion of content owners’ intellectual property rights, the Broadcast Flag in fact places no restrictions on home copying (as would a watermark technology), and thus fully preserves consumers’ personal-use privileges under the *Sony Betamax* holding.

The Computer and Communications Industry Association attempts an even further expansion of the scope of fair use by claiming that “any restriction on fair use violates the First Amendment.”<sup>21</sup> This assertion simply is wrong as a matter of law. Fair use is not a categorical guarantee of the ability to use *any* specific content, or to use content in any particular way.<sup>22</sup> Rather, the doctrine relies on a balancing of factors, including “the effect of the use on the

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<sup>18</sup> Comments of ALA at 6.

<sup>19</sup> 17 U.S.C. § 107 (“... the fair use of a copyrighted work . . . is not an infringement of copyright.”).

<sup>20</sup> *Sony Corp. of America v. Universal City Studios*, 416 U.S. 417 (1984).

<sup>21</sup> Comments of CCIA at 20; *see also, e.g.*, Comments of Public Knowledge at 17 (“To the extent that a broadcast-flag proposal might curtail fair use, it undercuts First Amendment values.”)

<sup>22</sup> U.S. Copyright Office, *Fair Use* (June 1999) (“There is no specific number of words, lines or notes that may safely be taken without permission.”).



market for or value of the copyrighted work.”<sup>23</sup> Where that test indicates that the defense is unavailable, no First Amendment right to use the content – or, stated differently, no First Amendment right to infringe -- exists.<sup>24</sup>

Similarly, the Electronic Frontier Foundation bases its complaint that the Broadcast Flag “would sacrifice non-infringing uses, including . . . sending short excerpts by e-mail”<sup>25</sup> on the unsupported premise that sending short excerpts by e-mail is necessarily always a fair use. The various professional and amateur sports leagues allow the royalty-free use of highlights in certain contexts (principally regularly-scheduled news shows), and, in other situations, license highlights to entertainment programs (such as NFL PrimeTime and NFL 2Night) for a fee.<sup>26</sup> If a person were to copy short excerpts from digital sports broadcasts and distribute them sufficiently widely by e-mail or by posting to a Web site, there could be a significant impact on the market for, and value of, those highlights. Consumers would have less interest in watching those highlights on the entertainment shows to which the highlights traditionally have been licensed for fee. In such a scenario, the quality and nature of the use – taking and redistributing the most exciting parts of sports telecasts in a manner that is likely to harm their market value – should make the fair use defense unavailable as a justification for the conduct in question.

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<sup>23</sup> 17 U.S.C. § 107.

<sup>24</sup> See MELVILLE B. NIMMER AND DAVID NIMMER, NIMMER ON COPYRIGHT, § 1.10[D] (2002) (“A grave danger to copyright may lie in the failure to distinguish between the statutory privilege known as fair use, and an emerging constitutional limitation on copyright contained in the First Amendment.”).

<sup>25</sup> Comments of EFF at 15.

<sup>26</sup> To allow sports highlights to be shown on local news but still preserve the secondary market for such excerpts, each of the leagues have and enforce temporal restrictions on highlight use – usually from one to two days after the sporting event has occurred. For example:

- Under the NFL’s written policy, networks, their affiliates and other TV stations and cable services, on Sundays, may use up to a total of six minutes per program of film or tape of a day’s NFL games in their regularly-scheduled news programs (provided the game is not still in progress). On other days, they may use two minutes of film or tape within a seven day period of the game. No use of film or tape of a game on an Internet site is permitted unless the film or tape is part of a single, non-archived, online simulcast of a television station’s regularly-scheduled programming. Use of highlights in non-news programs is the subject of the NFL’s contracts with video programming distributors.
- PGA TOUR currently grants permission to legitimate news media to use, without charge, a limited amount of footage of Tour events as part of regularly scheduled news programs, but only after the conclusion of the day’s play.
- The NCAA permits limited royalty-free use of footage of its post-season tournaments within 72 hours of a game.

These examples are provided for explanatory purposes, are subject to change, and do not represent the highlight policies of each of Professional and Collegiate Sports.

Protection of short excerpts of digital broadcast content is consistent with judicial recognition of the substantial economic value of sports highlights and the limited availability of the fair use defense for their appropriation. More than twenty years ago, in *New Boston Television v. ESPN*, a Massachusetts state court rejected the fair use defense raised by ESPN for use of highlights of Boston Red Sox games broadcast from a local television station.<sup>27</sup> There, the court observed that, notwithstanding the *de minimis* length of the excerpts (under two minutes), "it is the quality of the use rather than its quantity which is determinative. The excerpts used by defendants in this case, although of relatively short duration, are the 'highlights' of each broadcast and, as such, their use may be considered substantial."<sup>28</sup> With respect to economic value, the court determined that the highlights of one team in one local market were worth hundreds of thousands of dollars.<sup>29</sup> A measure such as the Broadcast Flag to protect the market for *all* sports highlights would be consistent with this longstanding precedent.

Similar rights as the interest in highlights were protected in a recent decision in *Morris Communications Corp. v. PGA Tour, Inc.*<sup>30</sup> There, in upholding the Tour's right to limit Internet access to "instantaneous information and its value," the court said that the Tour:

has a right to sell or license its product, championship golf, and its derivative product, golf scores, on the Internet in the same way the PGA Tour currently sells its rights to television broadcasting stations. fn/

fn/ With the emergence of "web-casting" and "streaming" video and other rapid advancements in technology, a negative answer to the question of whether the PGA Tour has broadcast rights on the Internet would stymie advancement and reduce incentive to create entertainment and sports programming by foreclosing a lucrative market.<sup>31</sup>

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<sup>27</sup> *New Boston Television v. ESPN*, 215 U.S.P.Q. (BNA) 755 (D. Mass. 1981), 1981 U.S. Dist. LEXIS 15032 (granting motion for preliminary injunction against ESPN's unauthorized use of Boston Red Sox highlights).  
<sup>28</sup> 1981 U.S. Dist. LEXIS 15032 at \*6-7.

<sup>29</sup> Under the terms of a settlement, the parties submitted to the district court the question of the amount of damages from the unauthorized use of highlights from the 1979-81 seasons, which the court determined were just over \$60,000. For an explanation of the case, see Robert Alan Garrett and Philip R. Hochberg, *Sports Broadcasting*, in *LAW OF PROFESSIONAL AND AMATEUR SPORTS* (West Group 2002) at § 20:15.

<sup>30</sup> Order granting Motion for Summary Judgment, Case No.: 3:00-cv-1128-J-20TJC, M.D., FL, December 13, 2002.

<sup>31</sup> *Morris*, Text at 22.

To that end, the licensing (paid or royalty-free) of highlights is not an open invitation to anyone's use of protected content anywhere.

Because of its necessarily comprehensive quality, the Broadcast Flag represents an equitable balancing of interests, similar to the set of factors for fair use analysis in the Copyright Act. The Broadcast Flag's preservation of home copying rights provides consumers with substantial rights to use copyrighted material. But these interests must be balanced against the need of copyright owners to protect their product. In the case of sports highlights, even short excerpts can have a dramatic effect on the secondary market for such content. Applying the fair use test to digital broadcast content, whose potential for widespread infringement is exponentially larger than in the analog context because of the technology's susceptibility to copying and redistribution, must necessarily lead to careful limitations in the application of the fair use defense to digital broadcast content.

#### **IV. Analog Hole**

Several parties joined Professional and Collegiate Sports in urging the Commission and Congress to adopt measures to address the conversion of digital broadcast signals for viewing on analog television sets and the potential for unimpeded reversion to a digital format and redistribution of that content.<sup>32</sup> The "analog hole" is not explicitly at issue in the instant proceeding, as the BPDG's Final Report does not address delivery of digital broadcast content through analog outputs. However, the substantial body of legacy consumer electronics equipment means that the analog hole must be addressed concurrently with the Broadcast Flag, as even opponents of the Flag recognize.<sup>33</sup> Accordingly, Professional and Collegiate Sports reiterate their support for industry, Commission, and Congressional attention to the analog hole as a key part of development of a comprehensive redistribution control mechanism for digital

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<sup>32</sup> Comments of Professional and Collegiate Sports at 12-13; Comments of Philips at 1-2, 12; Comments of  
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broadcast content.

## **V. Conclusion**

The Commission should realize that redistribution control of digital broadcast content is a prerequisite to its widespread availability. Without it, many content owners may feel compelled to consider distributing more content on more secure conditional access technologies rather than via unprotected over-the-air broadcasts. Accordingly, Professional and Collegiate Sports, as copyright owners of some of the most popular broadcast programming available over-the-air, urge the Commission to adopt a redistribution control mechanism for digital broadcast content.

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Digimarc & Macrovision at 6; Comments of Veridian at 3.  
<sup>33</sup> Comments of Verizon at 3.

Respectfully submitted,

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